

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of MARY KIANA JAMES and  
KAYLA JOYCE JAMES, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

OTHA LEE JAMES, JR.,

Respondent-Appellant.

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UNPUBLISHED

July 24, 2007

No. 274866

Oakland Circuit Court

Family Division

LC No. 05-713874-NA

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to his daughters under MCL 712A.19b(3)(b)(i), (g), and (j). We affirm.

On September 2, 2005, while changing then three-year-old Mary's diaper, Kiona Bryant, the children's mother, noticed that the child's vaginal area was red and swollen. Ms. Bryant asked Mary whether Dontae or Terrill, her two older sons, had touched her butt, the term the child used to describe her entire vaginal area. Mary denied that it was either Dontae or Terrill. When Ms. Bryant asked if respondent had touched her butt, Mary responded affirmatively. Ms. Bryant asked Mary to show her what respondent did, and according to Ms. Bryant, Mary spread her legs open, touched her clitoris with her finger and wiggled it. As she motioned, she stated, "This is how daddy does it." Ms. Bryant called respondent at work and accused him of sexually abusing the child. Respondent came home. He and Ms. Bryant argued, and respondent accused Ms. Bryant's 13-year-old son Dontae of being the perpetrator.

Respondent took Mary and Kayla to the hospital, and Ms. Bryant called the police. The gynecologist who examined Mary wrote in the medical report that there was no physical evidence of abuse. The gynecologist also indicated in her report that Mary had stated that Dontae was the person who had touched her as she described. Both protective services and the police investigated Ms. Bryant's allegations. The detective investigating the matter testified that it was not uncommon for there to be no physical evidence of sexual abuse in cases of digital penetration. He indicated that no criminal charges were being pursued against respondent concerning the incident. The protective services worker referred Mary to a forensic interview.

Amy Allen, a forensic interviewer with training in interviewing children about alleged sexual abuse, interviewed Mary. Ms. Allen testified that, although Mary could not articulate the difference between right and wrong, she was able to speak in a narrative fashion. When asked if something had happened to her body, she told Ms. Allen that her daddy had stuck his fingers in her “booty.” While she talked, she demonstrated by taking her own fingers and touching her genitalia over her clothes. Ms. Allen testified that the fact that Mary demonstrated what happened to her without being asked was a way children used to demonstrate something they had a difficult time articulating. When asked to describe “booty,” Mary touched her genitalia area. In a drawing of a female body her own age, Mary identified the various body parts and labeled the genitalia and buttocks “booty.”

Based on this interview and the protective services worker’s investigation, petitioner filed an initial petition to terminate respondent’s parental rights, alleging that respondent had sexually abused Mary and failed to provide proper care and custody of Mary and of Kayla, who was then two years old. Before trial, petitioner filed a motion seeking a hearing to admit Ms. Bryant’s and Ms. Allen’s hearsay testimony of Mary’s statements pursuant to MCR 3.972. Ms. Bryant and Ms. Allen testified at the evidentiary hearing regarding the statements made to them by Mary. Ms. Bryant also admitted that she and respondent did not have a good relationship and had already agreed, before the accusation, to a divorce. Finding that Ms. Bryant was a credible witness and that Ms. Allen followed the forensic interview protocol set forth by the Governor’s Task Force, the court concluded that the witnesses’ statements did provide an adequate indicia of trustworthiness and were thus admissible in respondent’s termination trial.

During the course of the hearing, the prosecutor sought to introduce evidence of respondent’s 1989 conviction of criminal sexual conduct involving his then eight-year-old niece, arguing that the evidence was more probative than prejudicial and that it addressed the issue of the identity of the perpetrator. Despite respondent’s counsel’s challenge to admission on the grounds that the conviction was too old, more probative than prejudicial, and inadmissible bad acts evidence, the court concluded that evidence of the conviction was admissible.

At trial, respondent testified and denied sexually abusing Mary. He admitted to pleading guilty in 1989 to the criminal sexual conduct charges, conceding that he had sexually abused his niece over a nine-month period and the acts at issue involved penetration. He served eight years and completed treatment both while incarcerated and after his release. The police officer who investigated Mary’s allegations testified that he interviewed respondent, that respondent denied sexually abusing Mary but admitted that he had sexually abused his eight-year-old niece, and that the abuse was perpetuated over an extended period. Respondent sought to have Mary testify at trial, but the court concluded, after the parties asked some competency questions, that the child lacked competency to testify. Following closing arguments, the court concluded that the evidence supported termination of respondent’s parental rights under §§ 19b(3)(b)(i), (g), and (j) and ordered a best interests hearing.

Dr. Julie Kwon, a fully-licensed psychologist who evaluated respondent in connection with the best interests hearing, and respondent testified at the best interests hearing. Focusing on the facts that respondent minimized the sexual abuse of his niece, by contending that the child enjoyed the sexual encounters, and was unable to articulate what he had learned from his sexual offender treatment program, Dr. Kwon concluded that respondent lacked insight that would put the children at risk for future sexual abuse. Given respondent’s lack of insight into his problems,

Dr. Kwon felt that respondent's prognosis was poor. Respondent testified that he loved the children, and he denied hurting them. He admitted that at the time of the best interests hearing he was unemployed, did not have a financial plan for the children's care, and did not have suitable housing for them.

On November 20, 2006, the court issued a written opinion and order. The court concluded that petitioner had established its statutory grounds in support of termination, finding that Ms. Bryant was a credible witness, that Ms. Allen's and Ms. Bryant's testimony was compelling, and that, in light of the allegations of digital penetration, the lack of physical signs of abuse did not indicate that no abuse took place. The court also found that termination was not contrary to the children's best interests, relying upon the testimony of Dr. Kwon.

On appeal, respondent first argues that the evidence did not support termination under any of the statutory grounds upon which the court relied. because there was no physical evidence of sexual abuse. We review the trial court's decision for clear error. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Although Mary's medical examination showed no physical evidence of sexual abuse, there was testimony that, in cases of digital penetration, it is not very common for there to be evidence of physical injury. Furthermore, because the court found that Ms. Bryant's and Ms. Allen's hearsay testimony regarding Mary's statements of the sexual abuse were admissible, the statements were admissible in lieu of the child's testimony and as substantive evidence of the act. MCR 3.972(C)(2)(a). Both Ms. Bryant and Ms. Allen testified that Mary had told them that respondent had touched her genitalia and had demonstrated, on her own body, how he had touched her. The court concluded that Ms. Bryant's and Ms. Allen's testimony was compelling and that Ms. Bryant was a credible witness. The court also concluded that Mary, who could describe what happened and could discern her different body parts on a diagram, was truthful even if, in response to certain questions, she could not distinguish between the truth and a lie. Where clear and convincing evidence supported the court's finding that respondent had sexually abused Mary, the trial court did not clearly err in terminating respondent's parental rights under §§ 19b(3)(b)(i), (g), and (j). MCR 3.977(G)(3).

Next, respondent contends that termination was contrary to the children's best interests. Under MCL 712A.19b(5), the court must order termination of parental rights if it finds that there are grounds for termination "unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." In finding that termination was not contrary to the children's best interests, the court relied upon the testimony of Dr. Julie Kwon, who had performed a psychological evaluation of respondent for purposes of the best interests hearing. Respondent argues that Dr. Kwon's testimony was not reliable because she did not review the medical evidence showing a lack of physical evidence of abuse and was not aware of the tenacious relationship between respondent and Ms. Bryant. However, Dr. Kwon was questioned about her failure to consider these other elements and stated that she had adequate information upon which to render her opinion. Furthermore, because the court had in the adjudicative phase of the termination trial already concluded that there was evidence of sexual abuse, Dr. Kwon was not required, contrary to respondent's argument, to consider whether the sexual abuse had occurred. As such, the court did not err in relying on Dr. Kwon's testimony which supported its finding that termination of respondent's parental rights was not contrary to the children's best interests.

Respondent next argues that the trial court abused its discretion when it concluded that the hearsay testimony of Ms. Bryant and Ms. Allen recounting statements Mary made to them was admissible in respondent's termination trial. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998). Where termination of parental rights is sought at the initial dispositional hearing, the statutory grounds for termination must be established by clear and convincing admissible evidence. MCR 3.977(E). Hearsay, a statement, other than one made by a declarant while testifying at a trial or hearing, which is offered as proof of the truth of the matter asserted, generally may not be admitted as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. MRE 801; MRE 802.

Pursuant to MCR 3.972(C)(2)(a), a statement made by a child under ten years of age regarding sexual abuse or exploitation performed on the child is admissible as substantive evidence through the testimony of the person to whom the child made the statement, provided that "the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." Circumstances providing an adequate indicia of trustworthiness may include spontaneity and consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate. *Matter of Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991). "Whether particular guarantees of trustworthiness are present depends on the totality of the circumstances. *Id.*

The court held a MCR 3.972 evidentiary hearing before trial to consider petitioner's request to allow hearsay testimony from Ms. Bryant and Ms. Allen. After hearing Ms. Bryant's and Ms. Allen's testimony, the court concluded that the witnesses' statements provided an adequate indicia of trustworthiness. The court focused on the fact that Ms. Bryant first asked Mary if one of her brothers, Dontae or Terrill, had touched her before asking the child about respondent. The court also addressed the concerns that Ms. Bryant may have fabricated the allegations because of the strained relationship between herself and respondent, noting that she had called respondent and confronted him before she called police. The court found that Ms. Allen had followed the forensic interview protocol set forth by the Governor's Task Force. With respect to Mary's competency, the court concluded that the fact that the child could not discern a truth or lie with respect to some questions did not prevent the interview from going forward. The court also concluded that the fact that Mary was able to describe what went on and distinguish different body parts supported a finding that the child was telling the truth. The court's consideration of the totality of the circumstances surrounding the giving of the statement, including the consistency of Mary's statements to both Ms. Bryant and Ms. Allen, the setting and manner in which Mary was questioned about the abuse, and Mary's use of language appropriate to children her age, supported its finding that there was an adequate indicia of trustworthiness. Accordingly, the trial court did not abuse its discretion in finding the hearsay testimony admissible under MCR 3.972.

Finally, respondent contends that the court abused its discretion in admitting the evidence of his 1989 conviction of criminal sexual conduct. We agree that the evidence was not admissible under MRE 404(b). MRE 404(b) is implicated when evidence of a person's other crimes, wrongs, or acts is used to establish a party's character and the conduct at issue can be inferred from the party's character. *People v VanderVliet*, 444 Mich 52, 62-64; 508 NW2d 114

(1993), modified 445 Mich 1205 (1994). Because the conviction at issue involved respondent sexually abusing a child relative and the termination case involves allegations that he sexually abused his own child, MRE 404(b) applies. Evidence of other crimes, wrongs or acts is admissible under the rule if (1) the evidence is offered for a proper purpose rather than to prove the defendant's character or propensity to commit a crime, 2) the evidence is relevant to an issue or fact of consequence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999). The rule limiting the admissibility of bad acts evidence applies in civil as well as criminal cases. *Lewis v Legrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003).

Respondent argues that evidence of the conviction was not offered for any purpose other than to prove respondent's character or propensity to commit the crime. The prosecutor argued that evidence of respondent's sexual abuse of his niece was admissible to establish respondent's identity as the perpetrator of Mary's sexual abuse. The use of prior bad acts evidence to establish identity is permitted under MRE 404(b). However, the only way that the evidence that respondent had sexually abused his niece established his identity as the perpetrator of the sexual abuse in the instant case is by implying that respondent was more likely to have sexually abused Mary than his stepson Dontae because he had sexually abused a child in the past. It is precisely this type of conclusion that MRE 404(b) attempts to preclude. Notwithstanding this error, reversal is not warranted in the instant case because there is no reasonable probability that the error affected the outcome of the trial. *Caldwell, supra* at 123. In rendering its opinion that the evidence supported termination under the statutory grounds cited, the trial court did not rely upon respondent's prior criminal sexual conduct. Rather, the court relied on the credibility of the other witnesses.

Affirmed.

/s/ Helene N. White  
/s/ Brian K. Zahra  
/s/ Karen M. Fort Hood